

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

University of Rochester

Employer

and

Case 3-UC-518

**International Union Of
Operating Engineers, Local 832S**

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, an investigation was conducted, and the issues raised by the petition were considered.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon an administrative investigation based upon the filing of the petition in this proceeding, I find:

1. The University of Rochester (Employer) is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

¹ The University of Rochester is a New York State education corporation, with a principal office and place of business in Rochester, New York, where it is engaged in providing higher education and conducting research. Annually, the Employer in conducting its business operations, derives gross revenues valued in excess of \$1,000,000, and purchases and receives at its Rochester, New York facility, goods and materials valued in excess of \$5,000 directly from points located outside the State of New York.

2. The International Union of Operating Engineers, Local 832S is a labor organization within the meaning of Section 2(5) of the Act.²

3. The current collective-bargaining agreement between the Employer and the Petitioner, effective from August 17, 2003 until August 17, 2006, contains a recognition clause by which the University of Rochester recognizes the Petitioner as the exclusive collective-bargaining representative of the following employees, herein called the skilled trades unit:

All regular full-time and regular part-time craft and maintenance employees who work in the University Facilities Operations other than Central Utilities. Craft and maintenance employees are those whose duties are defined by classifications such as those listed in Appendix B for the purpose of collective bargaining with respect to wages, hours, and conditions of employment. Not represented by the Union are all other employees in the Facilities Department and administrators, professionals, supervisors, confidential employees, clerical, technicians, all employees in other certified bargaining units, student employees and temporary employees.

The Petitioner has represented the Employer's skilled trades employees since the 1970s. Prior to becoming signatories to the current collective-bargaining agreement, the Employer and the Petitioner negotiated four consecutive collective-bargaining agreements, dating back to August 20, 1995, the relevant time frame for this matter, governing the terms and conditions of employment for the skilled trades unit.

4. The Petitioner filed the instant petition on November 15, 2005, proposing to clarify the skilled trades unit by accreting to the unit the position of data control clerks/dispatchers,³ herein referred to as data control clerks.

² Petitioner is the successor to International Union of Operating Engineers, Local 71-71A. Local 71 and 71A merged with the International Union of Operating Engineers, Local 832 and became known as International Union of Operating Engineers, Local 832S.

³ Prior to the filing of this UC petition by the Petitioner, the Communications Workers of America, Local 1170, filed an RC petition seeking an election among the nine data control clerks (referred to as "customer service

5. Clarification of the bargaining unit is not warranted inasmuch as the investigation revealed that the data control clerks sought by the Petitioner have been historically excluded from the bargaining unit and there is no evidence of any recent, substantial changes to the position of data control clerks/dispatchers warranting clarification of the unit. Furthermore, the investigation establishes that the data control clerks do not share an overwhelming community of interest with the bargaining unit employees and thus, it would be inappropriate to accrete them to the existing unit rather than affording them an opportunity to vote concerning their representation status.

The Petitioner claims that the data control clerks share an overwhelming community of interest with the skilled trades unit employees because the function of the data control clerks has evolved since 1995, from primarily a secretarial role to one in which they have the ability to perform some of the same work tasks as the skilled trades employees.

The Employer maintains that, although the three data control clerk job locations were merged in 1995 to create the current customer service center, and technical advances by the utilization of a computer monitoring system were also put in place in 1995, the main job duties of the data control clerks have remained essentially the same. It claims that any changes to the position have been insignificant rather than substantial.

Facts:

The University of Rochester is a private university that includes the University Medical Center, Strong Memorial Hospital, Eastman School of Music, the Memorial Art Gallery, the Laser Laboratory, and the various buildings and departments on the university campus. The majority of the buildings and complexes that house the entities listed above are in the vicinity of

representatives” in the petition) employed by the Employer. An election was scheduled for December 14, 2005, but on December 12, the Communication Workers of America, Local 1170 requested withdrawal of its petition.

Elmwood Avenue and East River Road in Rochester, New York. The Memorial Art Gallery and the Eastman School of Music are located in downtown Rochester.

The Petitioner, and its predecessor, have represented the maintenance skilled trades bargaining unit since 1977. The Petitioner also represents another bargaining unit, comprised of approximately 20 employees, at the Employer's facilities, called the central utilities bargaining unit. The central utilities employees work primarily in the power house located on the Employer's university campus. All of the job classifications in the skilled trades and central utilities bargaining units are in the Employer's Facilities Department. Although these two units are separate, they are covered by one collective-bargaining agreement and the exclusions from both units are identical.⁴

There are eleven different trades and numerous jobs classifications included in the skilled trades unit. The employees are responsible for the main system operations throughout the Employer's various locations. They are directly supervised by 18 different first-line supervisors. The first-line supervisors report to four different directors depending on work location or trade. None of these first line supervisors oversees the work of the data control clerks at issue here. All skilled trades employees wear uniforms that include brown shirts, black pants and work boots. The pay rate for the skilled trade employees is approximately \$20.00 per hour.

The data control clerks, also known commonly as "dispatchers," are part of the Employer's Facilities Department and report to work at what is known as the customer service center located in the medical annex building near the Employer's University Medical Center. Currently there are nine data control clerks, including one employee who holds the position of data control working leader. All of the data control clerks reported directly to first line

⁴ As noted above, the Petitioner seeks to clarify only the skilled trades bargaining unit by accreting the data control clerks to the unit.

supervisor, Karen Kohl, who reported to the Director of Support Operations, Patricia Beaumont.⁵ Kohl did not supervise any of the skilled trades employees. It is not clear whether Beaumont supervises any of the direct line supervisors of the skilled trades unit employees.

Until 1995, data control/dispatcher work was performed by employees in three separate locations: Medical Center Facilities Operations (day time service calls), River Campus Facilities Operations (day time service calls), and Central Utilities Energy Operations Group, (off-hour service calls and monitoring of alarms). In 1995, the three locations were merged to create the current customer service center. The core function of the data control clerk position and its duties remained essentially the same before and after the merger. The customer service center operates 24 hours per day, 7 days per week, and the data control clerks that work there are responsible for dispatching all service calls to the appropriate skilled trades personnel via pager, telephone and/or radio, monitoring building automation alarm systems, and creating work orders. The majority of the work performed by the data control clerks is done at stationary computer terminals in the customer service center, and the data control clerks have little, if any reason, to leave the customer service center in the course of performing their jobs.

The data control clerks are not required to wear uniforms. They earn approximately \$13.00 per hour. The data control clerks interact with the maintenance skilled trades only to the extent that they dispatch skilled trades employees in response to service calls. Additionally, the data control clerks monitor the computer systems that control the building automation alarm systems and answer incoming service calls from the Employer's various locations. The data control clerks then dispatch the appropriate skilled trades employees to the proper building or area that needs service. The data control clerks have little or no face-to-face contact with any but

⁵ Kohl has recently left the University of Rochester and is no longer employed as the first line supervisor of the data control clerks. Her replacement has not been named.

a few of the employees in the skilled trades and central utilities bargaining units. There is no evidence of any interchange between the data control clerks and the skilled trades or central utilities employees. More specifically, data control clerks are never assigned, either on a temporary or permanent basis, to perform skilled trades work. Data control clerks do not possess the skills and experience necessary to perform skilled trades work. Similarly, skilled trade employees are never assigned to perform the work of the data control clerks. There is no evidence that any data control clerk has ever applied for, or been given, a skilled trades position.

The Petitioner acknowledges that it has never attempted to include the data control clerks in either its skilled trades or central utilities bargaining units. It also concedes that during negotiations for a new collective bargaining agreement in 1999, when it was seeking the inclusion of an unrelated position in its units, the Petitioner informed the Employer that it was not seeking to represent the data control clerks because it regarded the employees working in that position as clerical employees. The Employer agreed with the Petitioner's assessment of the position. The inclusion of data control clerks in either unit has not been discussed in the past six years, during which time the parties have negotiated two contracts.

The investigation establishes that at some time in 2003, the data control clerks were given the responsibility of "load shedding." According to the Petitioner, "load shedding" is the process of disabling certain non-critical portions of the Employer's energy system in order to conserve energy for use in critical areas. For example, during a heat wave, the air-conditioning for the faculty offices at the University of Rochester may be temporarily disabled to conserve energy for use at Strong Memorial Hospital. The data control clerks initiate the load shedding process only after receiving direction to do so from the Employer's power house employees. The Petitioner admits that this is the only recent change in the duties and responsibilities of the data control

clerks. It also concedes that the data control clerks have only been called upon to do this task six times in the past two years and that the function can be completed within a matter of minutes simply by pressing computer keys. The investigation also reveals that the only other change in duties occurred in 2000 and involved a change in the location of the mainframe computer system that resulted in the data control clerks having the added responsibility of running a daily back-up tape for that computer system, another task that consumes only a few minutes of the workday. Running the back-up tapes for that particular computer system had previously been performed by the automation mechanics in the skilled trades unit.

Analysis:

The Board has held that when a job position or classification has historically been excluded from a unit and there have been no recent, substantial changes that call the unit placement of the excluded employees into question, it will not entertain a petition to clarify the status of that position or classification. Kaiser Foundation Hospital, 337 N.L.R.B. 161 (2002), Bethlehem Steel Corporation, 329 N.L.R.B. 245 (1999), Union Electric Co., 217 N.L.R.B. 666 (1975). In Union Electric, the Board stated that “(c)larification is not appropriate, however, for upsetting an agreement of a union and employer or established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.”

In this case, the data control clerks have never been included in either of the Petitioner’s bargaining units. Since 1995, the parties have negotiated multiple collective-bargaining agreements without changing the unit placement of data control clerks. The Petitioner was aware that the position existed throughout this time period and was knowledgeable about the

duties and functions of the employees occupying the position. Nevertheless, the Petitioner entered into successive agreements without providing for the inclusion of data control clerks in one of its two bargaining units. In fact, during the 1999 negotiations, the Petitioner admittedly informed the Employer that it regarded the data control clerks as clerical employees, and was, therefore, not seeking to include them in its bargaining units. In addition, clerical employees and all other Facility Department employees are specifically excluded from the description of the two units represented by the Petitioner, indicating that the Petitioner expressly consented to exclude them from these bargaining units.

Inasmuch as the data control clerks have been historically excluded from the bargaining units represented by the Petitioner with its express consent, it would be inappropriate to clarify the skilled trades bargaining unit to include them now unless there have been recent, substantial changes to the position. Bethlehem Steel, supra. The investigation establishes that there have been no such changes in this case. The Petitioner relies on two changes that have occurred in the last five to six years to support its claim: the added responsibility of running a daily back-up tape from the mainframe computer in 2000 and the load shedding duties assigned to data control clerks in 2003. Neither of these added responsibilities amount to recent, substantial changes. In fact, the additional responsibility of running daily back-up tapes occurred in 2000, long before the most recent collective-bargaining agreement was negotiated and the Petitioner did not seek to include the data control clerks into its units at that time. The most recent change, in 2003, gave the data control clerks load shedding responsibilities. The Petitioner concedes that load shedding has occurred merely six times over the course of the last two years and involves deactivating and activating parts of the Employer's energy supply system by pressing the correct keys on a computer. This task, when performed, consumes just a few minutes in the daily routine of the

data control clerk job. Even if this change occurred after the negotiations for the August 17, 2003 to August 17, 2006, collective-bargaining agreement contract were completed, such a minimal and sporadic change in the data control clerks' duties does not constitute a substantial change that would justify the clarification of the skilled trades unit to include these employees.

The Petitioner also claims that the data control clerks share an overwhelming community of interest with the employees in the skilled trades unit. The current position of data control clerk has been in existence since 1995, and cannot be construed to be a newly created position. For the reasons stated above, the data control clerk position cannot be considered to have undergone recent substantial changes that would allow for clarification. However, even if the data control clerk positions were a newly created position, and had not been historically excluded from the existing unit, it would be inappropriate to accrete the position to the Petitioner's bargaining unit. Under current Board law, accretion to an already-represented unit is appropriate only when the employees sought to be added to the existing unit have little or no separate identity and share an overwhelming community of interest with the employees in the preexisting unit. E. I. DuPont de Nemours, Inc., 341 NLRB No. 82 (2004), Archer Daniels Midland Co., 333 N.L.R.B. 675 (2001), In both of the above-cited cases, the Board noted that, in determining whether such an overwhelming community of interest exists, it evaluates several factors, including interchange and contact among employees, geographic proximity, similarity of working conditions, similarity of employees' skills and function, supervision, and collective-bargaining history; the Board observed that employee interchange and common day-to-day supervision are the two most critical factors.

The data control clerks and the skilled trades employees have little or no direct contact with each other and do not work in the same geographic area. In this regard, the data control

clerks work in the customer service center and the vast majority of the skilled trades employees work in the Employer's other facilities throughout the City of Rochester. The only skilled trade employees who work in the same vicinity as the data control clerks are the automation mechanics and those two groups are physically separated by a wall. The data control clerks do not share the same job skills and work functions with the skilled trades employees and there is an established history of collective bargaining pursuant to which the data control clerks have been excluded from the skilled trades unit. All the factors listed above militate against accretion. Most importantly, however, as noted previously, the data control clerks and the skilled trade employees have separate and distinct day to day supervision and the investigation revealed no evidence of employee interchange. When these two factors are combined with the other factors militating against accretion, it is apparent that it would be inappropriate to include these employees in the Petitioner's skilled trades bargaining unit without affording them an opportunity to vote. Based on the foregoing, even if the data control clerks had not been historically excluded from the skilled trades unit, they do not share an overwhelming community of interest with the employees in the existing unit. Therefore, they should be excluded from the skilled trades bargaining unit represented by the Petitioner.

Conclusion

Based on the record herein, I find that the Petitioner has not demonstrated that the data control clerks' duties have changed both substantially and recently enough to overcome their historical exclusion from the skilled trades unit, or that the data control clerks share an overwhelming community of interest with the employees in the skilled trades bargaining unit.

Accordingly, I find that the Petitioner's request for clarification of the skilled trades bargaining unit to include the data control clerks/dispatchers must be denied, and that the petition must be dismissed.

ORDER

IT IS HEREBY ORDERED that the unit clarification petition be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **December 27, 2005**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file a request for review of this Decision electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlr.gov.

DATED at Buffalo, New York this 13th day of, 2005.

/s/Helen E. Marsh
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